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No. 873

In the Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTES and LORRAINE M. ESTES, his wife; DONALD F. OWENS and JEAN OWENS, his wife, and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife,

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

and

MOTION FOR SUMMARY REVERSAL

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(It is earnestly requested that the Motion for Summary Reversal, Page 30 of this petition be read at this point.)

Petitioners pray that a writ of certiorari issue to review the judgment and opinion as amended, and pray for summary reversal of that portion of the judgment remanding the case to the district court to construe the findings or for a new trial.

OPINIONS BELOW

The opinion of the circuit court of appeals is reported in 250 F.2d 139. Judgment of the district court was not reported but is set forth in the record, together with findings of fact and conclusions of law and amendatory supplemental findings of fact and conclusion of law (R. 62-81; 107-117).

JURISDICTION

The judgment and opinion of the circuit court of appeals was first entered on October 30, 1957 (R. 148-156; 157). On petitioners' motion to correct or amend opinion (R. 158-166), the circuit court entered an order amending its opinion and denying petition for rehearing (R. 167, 168-169) on December 23, 1957. Jurisdiction of this court is involved under Title 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, ETC.

1. Fifth Amendment to the Constitution of the United States:

   " . . . ; nor shall private property be taken for private use, without just compensation."

2. Lanham Act, as amended, 54 Stat. 1125, 42 USCA 1521, Oct. 14, 1940, Public Law 849:

   "Sec. 1. In order to provide housing for persons engaged in national-defense activities . . . in these areas . . . in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal

Works Administration is authorized:

(a) " . . . to acquire lands or interests in lands by . . condemnation."

"Sec. 4. "When the President shall have declared that the emergency declared by him on Sept. 8, 1939, to exist, has ceased to exist (2) the authority contained in Section 1 hereof shall terminate . . ., and (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest."

3. National Emergency Proclamation No. 2352, Sept. 8, 1939 (54 Stat. 2634):

" . . . I, . . . President of the United States of America, do proclaim that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding and enforcing the neutrality of the United States and the strengthening of our national defense within the limits of peace-time authorizations . . ."

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is error for the lower court to remand the question of exclusive possession which is settled by the findings of fact (R. 107-108, Fdgs. I & II) and which was an issue arising on an averment (R. 8, par. VIII) and denial (R. 25, par. VIII; R. 40, par. VII) and which issue in the first findings was in favor of the plaintiff, then reversed in favor of the petitioners in supplemental and amendatory findings.

2. Whether an option to renew from year to year, condemned together with an estate for one year under the

Lanham Act (54 Stat. 1125), has lapsed, together with the estate, as a matter of law, under findings that annual rentals decreed as just compensation have not been proved paid and that the court cannot find that they have been paid.

3. Whether in view of the findings that the government failed to prove that just compensation has been paid and that the Court "cannot find" that such compensation has been paid (R. 107-108), the lower court has erred as a matter of law in stating "It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made the government's exclusive right of possession during such period, . . . would seem to be established" (R. 169), where the term was for one year, with the right to renew from year to year, and the owners have repossessed and the finding of the trial court applied to "at all times material to the action."

4. Whether under the Fifth Amendment to the Constitution, prohibiting the federal government from taking private property without just compensation, petitioners as owners of land can be made liable for damages, or for reasonable rent, to the federal government for the use of the land, where the findings are (1) that the government failed to prove its right to exclusive possession thereof at all times material to the action by the payment of just compensation, and (2) that the court cannot find that the government did pay just compensation as decreed for a term of one year, with an option to renew from year to year (R. 107-108), and (3) that petitioners were the owners of the lands in question

(R. 68, Introd.); and where the land and improvements revert as a matter of law for failure to renew before termination as provided in the stipulation and condemnation judgment based thereon?

STATEMENT

The jurisdiction of the court of first instance was based on Title 28 U.S.C. 1345 because the plaintiff United States was a party.

The court below on petitioners' appeal reversed money judgments against the petitioners on the ground that the judgment of the trial court was not supported by the findings of fact in that petitioners were not privy to the contract sued upon. However, the petitioners claim error because the circuit court remanded for the trial court to determine whether petitioners might be liable in damages as trespassers for possible periods in which the government might have had the exclusive right of occupancy, or on the theory of an implied contract to pay a reasonable rental value of the lands "either by construing the findings in the record or by proceeding to another trial, as may be thought proper . . . " Petitioners claim that the lower court has committed error because supplemental findings I and II make it unmistakably clear that the government had failed to prove its right of exclusive possession of said lands (R. 107-108, Fdgs. I and II), "at all times material to this action."

The only statement of the case needed, therefore, will be of the facts material to the consideration of whether or

not the record fairly and directly, considers the issue of the government's right to exclusive possession of the land, to quote the lower court, "during any of the time" when the petitioners owned the houses situated thereon, and whether or not the findings of fact are clear and direct and without ambiguity in disposing of this issue. On this the lower court said "We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether or not specific performance should be ordered. With regard to this only the government's immediate right to exclusive possession at the time the matter was before the court was important . . . "

The trial court entered two sets of findings, one on Oct. 20, 1955 (R. 62-74) wherein it found that petitioners (defendants below) had "at all times material to this action" interfered with the government's exclusive use acquired by condemnation; that the government has "continuously held the exclusive use" its term extending to Feb. 21, 1956 (R. 63-64, Fdg. II); that it acquired its right to exclusive use by the Judgment on Declaration of Taking entered June 16, 1945, and by subsequent Judgments Fixing Compensation, and was granted the right to renew said exclusive use. The government's exclusive use is repeated in Findings XIII, XIV, and XV (R. 71-73). The court allowed damages for wrongful use of the land (R. 80, Concl. XII).

By supplemental findings of fact entered April 26, 1956, the trial court reversed these findings on the matter of exclusive possession as follows:

FINDINGS OF FACT
I (R. 107-108)

(a) "That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings have, *at all times material to this action*, been and are now located. (Emphasis added)

II (R. 108)

"That the plaintiff has not fully sustained its burden, in that, although the judgment on the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."

emphasis is given to the phrase " . . . at all times material to this action . . . " inasmuch as the court stated in its order amending opinion (R. 168) that there would be no damages due on the theory of trespass or an implied contract to pay a reasonable rental value of the land,

> " . . . if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses . . . " (Amended Order, R. 168).

The phrase of the lower court "during any of the time" is in direct conflict with the following language of the findings

> " . . . at all times material to this action" (R. 108, Fdg. 1)

The government's right to exclusive possession at all times mentioned included all of the time when petitioners owned the houses located on the lands involved. As shown above this issue was once decided in favor of the government and then reversed and found in favor of petitioners. Examination of the pleadings upon which the issues were raised and evidence submitted, considered by the court and in the record shows the following:

The government pleaded (R. 8, par. VIII) its right to exclusive use of the land *at all times mentioned herein*. The times pleaded included the "period" petitioners rented (R. 7, par. VI), and the prayer included (1) an accounting *by all parties* of funds collected from tenants "by reason of the authorized use of said temporary buildings *and the land* upon which they are situated," and (2) for the allowance of a reasonable rental value to the government for said property (R. 9, items 4 & 5).

Petitioners' answers denied the government's alleged right to exclusive use (as to petitioner Ester, R. 25, par. VIII) and by paragraph VI Ester's answer admitting he was renting

the buildings situate on the lands described in plaintiff's par. IV. and admitted in Ester par. IV., Ester's Fifth Defense (R. 26) was that compelling him to remove the buildings would be a violation of his constitutional rights without due process of law. Ester's cross-complaint (R. 31, par. II) asserted his legal ownership of and right to use of the said lands and that the government has no right, title or interest to the use and possession thereof.

As to petitioners Barnett and Owens, their answer denied the government claim to exclusive use (R. 40, par. VII); admitted they were renting apartments on the lands described; in the Fourth Defense, they alleged that the government had abandoned the land involved and that the government had attempted to renew its leases from time to time in a manner not authorized by law; (R. 41). The Fifth Defense (R. 43) pleaded that the government was attempting to deprive them of their property without due process of law.

Supplemental findings I and II make no reference to the matter of specific performance of the contract also pleaded by the government.

Supplemental finding III states "That the present and only estate in the land here in question now claimed by the plaintiff expires on July 1st, 1956 . . . " (R. 108). The use of the words "now claimed" did not abrogate the previous two findings in which the trial court found that the government had failed to establish its exclusive right of possession of the real estate, and that it had failed to prove payment

of annual rentals decreed as just compensation (R. 107-108). Nevertheless, the circuit court committed error in stating in footnote 3 (R. 149) that "The government subsequently terminated its use as of June 30, 1956." In view of supplemental findings I and II, how could the government terminate the use which the findings said the government did not have? (Parenthetically, there is no finding of termination as of June 30, 1956. This was a self-serving statement de hors the record in the government's appeal brief below and objected to below by petitioners.) As to petitioners' property, the government's estate terminated as a matter of law by its failure to pay just compensation for its annual rental, and with it the right to the option to renew also lapsed.

To the extent that any further statement of the case is necessary, the following is offered. The record includes the complaint (R. 3-10) of the government and the answers (R. 24-32; R. 39-48) of the petitioners and all the findings referred to above. Not the least important is the report of the Special Master (R. 87), making an accounting of the rental income of petitioners Barnett and Owens for a period prior to the commencement of the action, to-wit, on and after June 1st, 1954, and as to petitioner Ester (R. 89) for the period commencing May 1st, 1954, said report having been approved and confirmed by the trial court (R. 107, introduction). The court took judicial notice of the original condemnation in 1945 and the continuous exclusive possession of the government in its first findings through to Feb. 21,

1956 (R. 70, Fdg. XII) and this necessarily included the period of time when the houses were acquired and situate upon the land, to-wit, Jan. 20, 1954 as to Barnett and Owens (R, 70c) and Nov. 19, 1953 as to Ester (R. 70d). It would seem unnecessary to spell out these dates inasmuch as the supplemental findings (R. 107-108, Fdgs. 1 and 11) held that the government had failed to sustain the burden of proof that it was entitled to exclusive possession of the "lands upon which the buildings, . . . have, at all times material to this action, been and are now located." When the trial court reversed its findings, the government did not ask for a new trial. It was the first of the parties to appeal but withdrew its appeal over objections of these petitioners argued to the court below (R. 142).

It should not be necessary to go behind the findings but for convenience excerpts from the Declaration of Taking and Judgments on Declaration of Taking, and from subsequent Judgments Fixing Compensation are in appendix.

REASONS FOR GRANTING THE WRIT AND FOR GRANTING SUMMARY REVERSAL

1. The court below has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this court's power of supervision, in that the lower court has disregarded plain findings. It has remanded for the trial court to construe its own findings of fact. The

findings being clear, the circuit court is delegating its appeal function back to the very court from which the petitioners took their appeal.

"A cause will not be remanded to the court of claims for amended findings where the findings are direct, free from ambiguity, consistent, fully responsive to the issues, and contain nothing indicating that they are ill founded in point of law" Syl. 5 *Luckenbach S.S. Co. v. U.S.*, (1926) 272 U.S. 533, 47 S. Ct. 186, 71 L. ed. 394.

"The fact having been established, against the presumption mentioned, that the trustees never conveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right to possession. Judgment should, therefore, have been ordered for the defendants." *Lincoln v. French*, 105 U.S. 614, 26 L. ed. 1189. This case is cited in the U.S. Supreme Court Digest, Vol. 2, Appeal and Error, § 1702, Entry of proper judgment, as follows:

> j. When a circuit court, on the trial of an action at law without a jury, makes a specific finding of fact on all the issues raised by the pleadings, and gives an erroneous judgment thereon the Supreme Court, on reversal, should direct such judgment to be entered by the Circuit Court as the specific finding requires.

"All the facts of the case being ascertained by the special findings of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general Judgment for the de-

fendants." *Allen v. St. Louis Natl. Bank*, 120 U.S. 20, 7 S. Ct. 460, 30 L. ed. 573 at 578 (1887). This case was used as a precedent in *Cleveland Rolling Mill Co. v. Rhodes*, 121 U.S. 255, 7 S. Ct. 882, 30 L. ed. 920 at p. 923:

> "It conclusively appearing, upon the facts found by the court below, that the original plaintiffs cannot maintain their action, it is ordered, in accordance with the precedents of *Fort Scott v. Hickinan*, 112 U.S. 15, and *Allen v. St. Louis Nat. Bank*, 120 U.S. 20, that the Judgment be reversed, and the case remanded to the Circuit Court with directions to enter judgment for the original defendants."

Supplemental findings I and II are so clear that they do not come within the rule of:

> "Where the special findings of fact are too imperfect to enable the court to direct judgment for either party, the judgment will be reversed and the cause remanded for a new trial," quoted from Syl. 2, *Saltonstall v. Birtwell*, 150 U.S. 42, 37 L. ed. 1128, 14 S. Ct. 170.

> "Confessedly, the court has found all the facts which have been directly established by the evidence . . . The inquiry thus presented is as to the legal effects of facts proved, . . . ", and "The rules relieves us from the necessity of considering the evidence at all and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the . . . ultimate effect of the facts, which the direct evidence has established, is left open for review here on appeal" *U.S. v. Pugh*, 199 U.S. 265.

The clear findings are substituted by the following conjectural statement from the opinion of the lower court:

> "It may be that the government was not prompt in completing its payments for previous months or years. But if such payments were ultimately made, the government's exclusive right of possession would seem to be established."

But this court said in *Sun Mutual Life Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 27 L. ed. 337:

> "The question, and only question, which we can consider is whether the facts found support the conclusion of law and the decision . . . The findings of fact, being in the nature of a special verdict, we can go neither behind them nor beyond them. We cannot correct them by inquiring into the evidence nor supply any omissions by intendment or inference."

It is a far departure from accepted judicial proceedings for a lower court to substitute conjecture for the positive findings of the trial court. It exposes petitioners to the unnecessary expense of a trial and appearances before the trial court.

Sun Mutual Life Ins. Co. v. Ocean Ins. Co., 107 U.S. 485, 27 L. ed. 337, at syllabus 2, also states:

> "A determination of the questions of law arising upon the record may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation or found by the court."

In *U.S. v. King*, (1849) 7 Howard 833, at 847, at 854 in reversing, this court said that although no statement of facts was filed until after the appeal:

> " . . . The facts upon which the question of title arises are as fully before us as if they had been set forth in the form of a case stated . . .
>
> " . . . the question in the Superior Court necessarily is whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record . . . "

Petitioners feel that the remand was not upon the facts before the lower court in the findings of fact, and that the lower court substituted conjecture.

Petitioners sought by Petition for Rehearing and Motion to Alter or Amend (R. 158-166) to correct a mistake appearing on the face of the opinion of the lower court where it was stated that the government had not proved that it had paid just compensation which it was obligated to pay to entitle it to continued exclusive possession of the tracts in question and that the government had not fully sustained its burden of proving its continued exclusive right to possession of the land in question (R. 151, last par. to R. 152), and then, by way of contradiction, to state that the cause should be remanded for a new trial on the question of whether these appellants are liable in damages as trespassers upon lands "on which the government had the exclusive right of occupancy, . . . " To this the lower court responded in its order amending opinion (R. 168-169) but committed error by seeking to restrict supplemental finding I and II (R. 107-108) of the lower court to the matter of specific performance instead of recognizing that said findings applied

to the issue of exclusive possession pleaded, and denied, and were fully disposed of by said findings I and II, and which in no way were involved with the issue of specific performance. It is crystal clear that had the government proved its right to exclusive possession, then the petitioners would have had to move the buildings even if they were not parties to the contract; this of course was exactly the case in the original findings where petitioners were ordered to move the buildings but, as first discussed herein, said findings were reversed.

In fact, supplemental finding II states:

> "The Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said building and clear the sites upon which they stand,"

because, as set forth in finding II, plaintiff had failed to prove payment of just compensation, the court could not find compensation had been paid, and the court said:

> "This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."

The issue of exclusive possession did not cease to be an issue merely because the court reversed its original finding.

Petitioners now ask the indulgence of this court in their use of parenthetical statements interpolated within quoted excerpts from the amended opinion of the lower court because the claimed errors occurred almost clause by clause. The lower court stated that the petitioners would not be liable to the government (R. 168)

"if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses . . . "

"We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered" (petitioners parenthetically call the attention of the supreme court to the fact that the preceding sentence is an inadvertent misstatement inasmuch as supplemental findings I and II (R. 107-108) had nothing to do with specific performance but were solely connected with the government's right of exclusive possession. And, as pointed out, supplemental finding III, which deals with specific performance, only indirectly concerns itself with the government's right of exclusive possession in terms of what the government "now claimed"). "With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important" (we again state parenthetically that supplemental finding I was directed to "at all times material to this action." The time went back to Feb. 21, 1945, the time of the original condemnation; and continued from year to year thru the subsequent judgments on condemnation, all dealing with the government's right of exclusive possession; the times also included the dates of the contract sued upon. The court necessarily had to be concerned with all of the times since the government alleged its right to exclusive possession "at all times herein mentioned" R. 8, par. VIII of the government's complaint.) "It may be that the government was not prompt in completing its payments for previous months or years but if such payments were ultimately made, the govern-

ment's exclusive right of possession during such period, at least as against these appellants, would seem to be established." (R. 168-169)

The concluding portion of finding III (R. 108) shows that it is directed solely to the matter of specific performance of the contract sued upon.

> " . . . to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all of the requirements of the contract of sale." (R. 109)

It is noted at this point that the findings say nothing about the government not being prompt. The findings definitely state that the government did not prove its right to exclusive possession, and did not prove it had paid just compensation, and that the court could not find that the government had paid compensation. The substitution of conjecture by the lower court for the facts established by the findings is clear error.

2. The lower court has committed error as a matter of law in ignoring the findings that the government had not proved payment of, and had not paid, just compensation as decreed, the lower court substituting its theory that " . . . if such payments were ultimately made, the government's exclusive right of possession . . . would seem to be established." This is in violation of the Fifth Amendment to the Constitution (page 2) prohibiting the federal government from

taking private property without just compensation. It is also in violation of the rules of evidence in that if the government fails to prove its right to exclusive possession and does not ask for a new trial, and does not appeal, then the fact found should not be substituted for by a theory of ultimate payment. Furthermore, this was not a taking in fee but a temporary use requiring an annual rental to be paid for a one-year tenancy with an option to renew from year to year.

In this respect, the lower court has by ignoring the clear findings decided an important federal question not hitherto decided, namely, that an option to renew and the estate term would not terminate as a matter of law under the trial court's findings I and II (R. 107-108) that the government had not proved its right to exclusive possession of the land in question and that it had not proved payment of annual rentals decreed as just compensation, and that the court could not find that such just compensation had been paid. The estate was condemned under the Lanham Act (R. 54, Stat. 1125) (page 2) for one year commencing February 21, 1945 (Appendix 5) (R. 71) together with an option to renew from year to year without the owner's consent but not beyond three years after the termination of the National Emergency declared to exist by the President on Sept. 8, 1939, (page 3); the owners were in possession and had codified to conform to the City of Seattle Building Code requirement (Rdg. XV, R. 73), and were renting the premises (Fdg. X, R. 68).

The applicability of the basic law of landlord and tenant to the sovereign in such a case is an important question which petitioners believe has not been decided before by this court although it is shown later herein that the government has been made subject to the law of landlord and tenant under a leasehold term. Ancillary to the above two questions is a further question which the petitioners feel has not been decided before, namely whether the circuit court may ignore the trial court finding that compensation was not paid and substitute therefor the circuit court's theory that "if such payments were ultimately made" the government might have exclusive possession for certain periods (see amended opinion of lower court, R. 169).

> "Where there is a delay in the payment of a condemnation judgment it cannot reasonably be said that its payment at some later date will amount to just compensation because the owner in such case is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation." *Feldman v. Chicago*, 363 Ill., 247, 2 N.E. 2d 102.

That the government may "ultimately" pay just compensation, which the trial court found was not paid, introduces a new doctrine in condemnation law. Even under a Declaration of Taking the government is required to make a reasonably estimated deposit in advance or at the time of taking. After judgments of just compensation have been entered upon stipulations between the parties, decreeing the amount of annual rent for a one-year term together with the

right to renew, the government is no different than any other tenant whose term is forfeited, or found not "in being" for failure to prove payment of the rents. The government condemned and elected to take a short term so as to be able to control and liquidate its obligations; it has provided for repayment to itself of prepaid rents and taxes (Appendix 7). What remedy has the owner against the sovereign? Only the well defined rules of landlord and tenant, the Constitution of the United States, and the law of eminent domain, and, in this case, the findings.

Why condemn an estate of one year with option to renew and set conditions, if compliance therewith is not required or important? The government's estate was a determinable one. In addition, its condemnation purposes were abandoned as is evidenced by the termination by the City of Seattle of the government's right to use city areas underlying the buildings, and the grant to petitioners to use said areas (R. 72-73, Fdg. XV).

In addition to the matter of the forfeiture of the right to exercise the option is whether or not the term lapsed because of the failure to pay annual rent.

3. That this court has not decided the option question involved herein is indicated by the discussion of the court in *U.S. v. Westinghouse*, 70 S. Ct. 644, and the dissent therein by Justice Jackson.

The judgment of just compensation required a payment each year for the option to renew as well as for the one-year exclusive use. In the absence of proof of payment of just compensation, it would appear clear that the U.S. would take nothing. It could not have a perpetual "taking"; rather, it was a loss of a determinable estate. In *U.S. v. General Motors Corp.*, 323 U.S. 374, p. 377, ftn. 3, it was stated that there is a value which must be paid for such an option as the one in the instant case.

> " . . . the State never got title, since the requisite compensation was never made." *Kennedy v. Indianapolis*, 103 U.S. 599, 606, 26 L. ed. 550.

The Indiana statute there involved did not state at what stage of the proceedings the owner's title should be divested but since he was not paid he retained title and stopped an attempted sale of his property by the state.

In the instant case there is likewise no provision for divestment of the government's exclusive use except its unilateral right to terminate on 60 days' notice; the provision for the owners' consent three years after termination of the national emergency was circumvented by extending the emergency into another emergency by the Emergency War Powers Acts[2].

The judgments fixing just compensation were final judgments not subject to modification or change, and the term and the option to renew were dependent upon compliance therewith, namely the payment of the annual rent decreed

as just compensation for a term to begin Feb. 21 of each year and which the findings II (R. 108) states was not paid.

The lower court could not vary the terms of the condemnation judgment and allow compensation payments not made to be "ultimately" paid for previous "months" or "years." *City of Des Moines v. Des Moines Water Co.*, 218 F. 939[1], is authority for the proposition that where a court has fixed the time for payment in a condemnation case there is no jurisdiction after the term to modify the judgment so as to extend the time, especially so when entered upon stipulation.

Where a government lease (not a condemned lease) expired without the government removing structures which it had the right to remove before expiration, ownership of the structures reverted with the land to the landowner. On a subsequent condemnation of the same land and structures the government was compelled to pay just compensation for the structures which it had erected. The government had had an option to purchase but it did not exercise it by compliance with the conditions and had defaulted for nonpayment of rent in *U.S. v. Certain Parcels, etc. v. Outer Harbor Dock &*

Syl. 2. "Where the court, as a part of a judgment fixing an award for a private water works system in a proceeding by a city to condemn the same, fixes the time for payment, it had no jurisdiction after the term to modify the judgment, so as to extend the term."

Syl. 3. "Where a decree was rendered by consent, entitling the city to acquire a privately owned water works system by condemnation on payment of a specified sum, the court did not modify the decree so as to extend the time for payment, without the consent of both parties.

Wharf Co., et al, 131 F. Supp 65. An involuntary condemned lease dependent upon compliance with a just compensation judgment should be as strictly construed as a non-condemnation lease.

Property may be recovered and "ejectment will lie where the condemning party fails or refuses to pay the compensation assessed . . . or by reason of expiration of the license, or lease under which entry was made . . . " *30 CJS, Eminent Domain,* p. 109, Sec. 397.

The decision of the circuit court comes in conflict with *U.S. v. Lee,* 106 U.S. 191, 1 S. Ct. 240, 27 L. ed. 171, which granted ejectment against the agents of the government. *Lee* was recently interpreted by this court as follows:

> " . . . if title had been in the plaintiff the taking of the property by the defendant would be a taking without just compensation, and, therefore, an unconstitutional action . . . for that reason, the suit for specific relief, to obtain the property . . . could be maintained . . . ", *Larson v. U.S.* 337 U.S. 682, 69 S. Ct. 1457.
>
> "If in the proceeding here, or in any condemnation proceeding where the judgment was given in the exact language of the declaration here, but the United States deposited only the rental value for one year and paid nothing for a property interest attempted to be created by such language for an additional period, the United States could hold only for one year under the judgment. *It is axiomatic that the United States will obtain only the exact property for which 'just compensation' has been paid no matter what the recitals of the judgment.*

An attempt to exercise the so-called option would be invalid. At the end of the year the landowner would be entitled to maintain ejectment notwithstanding the inclusion of such language in its judgment." *United States v. Crown-Zellerbach Corp.*, 60 F. Supp. 853, 860. (Emphasis added)

There is no need for ejectment here because Barnett, Owens and Ester are now the owners of the fee title and are in possession of the real estate.

"The United States is required to pay just compensation for the property taken and if just compensation has not been paid, and its officers wrongfully hold possession, they may be ejected. United States v. Lee, 106 U.S. 196." *United States v. Crown-Zellerbach Corp.*, 60 F. Supp. 853.

" . . . Judgment in a condemnation case must confirm the passing of title to the United States and place the title to the compensation for the full interest taken in the landowner and thus, *if the right of perpetual renewal is not paid for, the United States would not acquire that right even if a clause were inserted in the judgment.*

"In the second place, the just compensation must be paid in the immediate condemnation proceeding. *No authority exists nor ever has existed for the payment of just compensation by installments . . .*

"*There can be no judgment for an indefinite amount or a judgment payable by installments. The principle is followed that a judgment must be certain in amount and unconditional in effect . . .*

"What has been said establishes the fact that the stipulation permitting the United States to renew this lease

from year to year in perpetuity without the consent of the land owner constitutes the taking of a valuable property interest at the present time, for which just compensation must be paid in the proceeding." (Italics added.) *U.S. v. Bauman*, (1943) 56 F. Supp. 109, at 114.

Bauman gives a scholarly analysis of condemned temporary use of estates, and questions such estates because the government puts the power within its own hands to violate the rule against perpetuities by constantly extending the particular emergency so as to continue the power to renew. This case was decided in 1943 and was certainly prophetic regarding renewals, which created estates unknown to our law, namely, estates in perpetuity[2].

[2]The National Eemrgency Proclamation Sept. 8, 1939 (54 Stat. 2643). This Emergency was continued from time to time, once (Public Law 313) from April 14, 1952 to June 1, 1952; and then for 15 days to June 15, 1952 by Public Law 368 approved May 28, 1952. Notwithstanding the termination of states of war and of the National Emergency declared Sept. 8, 1939 (Proc. 2352, 54 Stat. 2643) and that declared May 27, 1951 (Proc. 2487, 55 Stat. 1647), the Congress by the Emergency Powers Continuation Act, 66 Stat. 330 (12) continued the emergency of Sept. 8, 1939 until 6 months after the termination of another emergency proclaimed Dec. 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p-71) "but in no event beyond April 1, 1953, notwithstanding any other terminal date or provision of law with respect to such statutory provision and notwithstanding any limitation, by reference to war or national emergency, of the time during or for which authorization or liabilities thereunder may be exercised or imposed."

Notwithstanding the reluctance of Congress to keep extending these acts for ridiculous periods, Congress did make what was to be the final extension with the above quoted language to indicate that that was all. The "government" was clearly warned. But once again the time was extended by deleting the date April 1, 1953 and inserting July 1, 1953 (67 Stat. 18). Three years after July 1, 1953, to-wit, July 1, 1956, the government had to get consent from the owner for renewal of the one-year terms. That is where the date comes from, which is referred to in footnote 3, the lower court opinion, (R. 149).

Since the government created these estates it should not be excusd from conforming to its own requested judgments nor should it be allowed immunity from well established rules of law.

4. The decision of the lower court is in conflict with another court of appeals on the same matter, to-wit that buildings on lands revert together with the lands to the owner as a matter of law upon the failure of the tenant to pay rentals due because of the forfeiture of the term and forfeiture of an option to renew for failure to pay rent.

U.S. v. Hayman, 115 F. 2d 599, 601, involved a lease by which radio towers remained the property of the U.S. and the government reserved the privilege of removing them at the end of the lease or within 90 days thereafter. The court said, "it is obvious that if the government should fail to remove the property before the expiration of the 90 days after the termination of the lease, the U.S. would lose the value of the property." In the instant case, the lease terminated with the option to renew for failure to pay rent; the U.S. was required under the provisions of the condemnation judgment to remove the buildings "prior to the termination of the lease." (Appendix 6)

In *Kutter v. Smith*, 69 U.S. 491, 17 L. ed. 830, this court considered an action against the fee owner to recover damages for the value of a building placed on leased premises.

Upon the tenant's failure to pay rent, the land owner retook possession, and Justice Miller said, in part:

> "The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable.
>
> "The doctrine, concerning this class of fixtures which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession; and has never been held to give a right of action against the landlord for their value.
>
> "The well settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the *fault of the plaintiff* and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and the labor, without compensation. It is from plaintiff's own default that the right to do this arises. *He had his option to pay the rent due defendant, and retain the right to payment for his building, when the time should arrive, or to give up his building, and with its loss relieve himself of the burden of paying rent. He chose the latter with the full knowl-*

edge, and there is no injustice in holding him to the consequence of his choice." (Emphasis added.)

Kutter v. Smith, supra, was quoted and followed as authority by the supreme court of the state of Washington in *Toellner v. McGinnis*, (1909), 55 Wash. 430, 435, 104 Pac. 641 (which was an action by the tenant for rents and two-thirds the value of a building) and the court said:

" . . . we are of the opinion that the default in rent and re-entry, under the terms of the lease, work a forfeiture of all right to rents subsequently earned . . . "

"It must also be admitted that the right to remove improvements or exact pay therefor, after the term, depends entirely upon the contract of the parties and was unknown to the common law — 'a strong invasion upon it' as has been aptly said. There is another fundamental principle that suggests itself . . . and that is that, whatever may be the form of the contract or manner of stating it, the building becomes, as it is erected brick by brick and stone by stone, a part of the land. So that, after all, from the very nature of things, the question is not a question of title reserved in the lessee, or the right to maintain title on the part of the lessor, but primarily a question of compensation; a right, if any, to recover the value of the building or declare a lien and enforce it as an equitable remedy. When so considered, the only question remaining is whether, under all the facts, appellants are entitled to such compensation. A similar contract was before the court in *Kutter v. Smith*, 69 U.S. 491, 17 L. ed. 830, wherein it was held that, in the absence of a covenant to remove within the term, the contract did not change the rule that the building became a part of the land and the title was in the lessor . . . "

MOTION FOR SUMMARY REVERSAL

Come now the petitioners and move this court for an order summarily reversing that portion of the judgment of the lower court remanding to determine:

> "The question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper."

This motion is based on the following grounds:

(1) On the matters and things alleged in the petition for writ of certiorari filed herein;

(2) That the lower court has substituted conjecture for very clear findings. We set forth both the findings and the conjecture. The findings were:

I. (R. 107-108)

(a) "That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings have, *at all times material to this action*, been and are now located. (Emphasis added.)

II. (R. 108)

"That the plaintiff has not fully sustained its burden, in that, although the judgment on the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled

to the requested order that the defendants be specifically compelled to remove said building and clear the site upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."

(b) In substitution for these findings, the lower court conjectured: That petitioners might be liable to the government for trespass, etc. but that:
"This would not be true *if* the government did not have the exclusive right of possession of the land during *any* of the time when these appellants owned the houses. Barnett, Owens and Ester argue that the trial court so held in its supplemental findings of fact.

"We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. *It may be* that the government was not prompt in completing its payment for previous months or years. *But, if* such payments were ultimately made, the government's exclusive right of possession during *such period*, at least as against these appellants, would seem to be established." (Emphasis added.)

(Amended Order, Dec. 23, 1957, R. 168-169).

(3) The grounds asserted in par. 2 immediately preceding are especially true, if it is noted that the trial court once entered but later reversed findings that the gov-

ernment did have exclusive possession *at all times material to the action*, that the government had conformed to judgments of just compensation, had timely renewed under its option to renew (R. 70-71, par. XII). Thus it is clear that *all times* material to the action were considered.

(4) It is unjust to submit petitioners to the burdensome risk of appearing before the trial court; and it is a far departure from the accepted and usual course of judicial proceeding to ignore clear findings and this court should exercise its power of supervision.

CONCLUSION

For the foregoing reasons petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted, and petitioners' Motion for Summary Reversal should be granted.

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Appendix 1

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

Excerpts from original opinion of the lower court (R. 148-156)

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,219

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife; DONALD F. OWENS and JEAN OWENS, his wife; EDWARD R. ESTER and LORRAINE M. ESTER, his wife,

vs.

UNITED STATES OF AMERICA,

Oct. 30, 1957

Appeals from the United States District Court for the Western District of Washington Northern Division

Before: Healy, Fee, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

"The government instituted this action on October 4, 1954. After a trial, findings of fact favorable to the government were entered. Based thereon, conclusions of law were entered, in which it was held that the government was entitled to a decree of specific performance enforceable against all appellants. It was also held that the

government was entitled to damages from all appellants, to be measured by the net revenues they had received from the rental of the buildings. The court determined that an accounting would be required to enable the court to fix the amount of damages to be awarded. In conformity with these conclusions, an order was entered referring the matter to a special master for an accounting and report. The master's supplemental report was later approved by the trial court.

"Thereafter, supplemental findings of fact were entered. It was found that the government had not proved that it had paid the future ascertainable installments of just compensation which it was obligated to pay to entitle it to continued exclusive possession of the tracts in in question. Because of this, the court found that the government had not fully sustained its burden of proving its continued exclusive right to possession of the land in question." (R. 151-152).

"The judgment against these three was not intended as an award of damages for breach of contract, since they were not privy to the contract. The theory of the award against them, as indicated by what has been said above, is that they were amenable to a decree of specific performance, but that, because the government had not proved its continued exclusive right to possession of the land, it would be more equitable to allow damages only, to be measured by the net rentals these appellants had received." (R. 152)

"Here, the award was not based upon expense incurred or damages sustained by the government, or upon the reasonable rental value of the land while appellants were using it for commercial purposes. Instead, the award was based upon the net rentals received by appellants from their own buildings during the time the

government had the right of possession of the land." (R. 153)

"It is nevertheless true that the complaint is broad enough to sanction damage on the theory of trespass or an implied contract to pay the reasonable rental value of the lands. It is possible that there may have been such a trespass, or the existence of circumstances from which a contract to pay the reasonable rental value of the lands may be implied." (R. 154)

Appendix 2

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,219

Dec. 23, 1957

ARTHUR G. BARNETT, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

Before: Healy, Fee, and Hamley, Circut Judges

It is ORDERED that the last paragraph on page seven of the opinion be stricken, and that the following paragraphs be inserted in lieu thereof:

"This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett, Owens, and Ester argue that the trial court so held in its supplemental findings of fact.

"We are not certain that is is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the

question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made, the government's exclusive right of possession during such period, at least as against these appellants, would seem to be established.

"In our view, justice therefore requires that the judgment as to Barnett, Owens and Eter be reversed and the cause remanded to the trial court. Upon remand, the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government."

It is FURTHER ORDERED that the last sentence of the fourth paragraph of page nine of the opinion be amended to read as follows:

"The judgment against Pague must therefore be reversed and the cause remanded for further proceedings similar to those which have been specified as to Barnett, Owens, and Ester."

It is FURTHER ORDERED that the petition for rehearing be denied.

(Endorsed:) Order Amending Opinion, etc.

Filed Dec. 23, 1957.

Paul P. O'Brien, Clerk.

Appendix 3

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife; DONALD F. OWENS and JEAN OWENS, his wife; EDWARD R. ESTER and LORRAINE M. ESTER, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15,219

Oct. 30, 1957

JUDGMENT

Appeals from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that

this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

(ENDORSED) Judgment
Filed and Entered: October 30, 1957
PAUL P. O'BRIEN, Clerk.

Appendix 4

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

Excerpt from Proceedings of Monday, December 23, 1957

Before. MEALEY, FEE and HAMLEY, Circuit Judges

ORDER DIRECTING FILING OF ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

ORDERED that the typewritten order amending the opinion of this Court, heretofore filed and entered on October 30, 1957, be forthwith filed by the Clerk.

FURTHER ORDERED that the petition for rehearing be, and hereby is denied.

Appendix 5

The Declaration of Taking (R. 70, fdg. XII, Plaintiff's Exh. A-34), filed June 15, 1945 provided that

> "the estate taken for said public use is the exclusive use of the land . . . for a period of one year with the right to renew from year to year for the duration of the National Emergency and three years thereafter . . . "

and the deposit made was

> "estimated by me to be just gross annual compensation for the exclusive use of said lands, together with the rights herein set forth— . . . "

The Judgment on Declaration of Taking (Plaintiff's A-35) was entered on June 16, 1945 and provided that

> "there is vested in the United States of America the exclusive use of the . . . land . . . for a period of one year, with the right to renew from year to year . . . ",

and recited that a deposit had been made for the estate taken for public use. Subsequent judgments were thereafter entered. (R. 71, Fdg. XII); those pertaining to the properties herein involved being filed as Defendants' Exhibit A-30 to 39 inclusive.

Appendix 6

While each judgment varied in detail, all contained identical language regarding just compensation and the amount of rental to be paid for the term. The following is quoted from the judgment of February 14, 1946 (which affected Parcel 3 and is Def's Ex. A-31) and, as stated, each of the judgments also contained this language:

> "1. That the sum of $27.50 is the just compensation and the total amount of damages to be awarded and paid for the taking by the United States of America for the exclusive use of said property . . . for one year beginning February 21, 1945, the date the United States acquired possession . . .
>
> "3. That the United States may exercise its right to renew the estate taken in said land from year to year as provided in the declaration of taking . . .
>
> "6. Title to all such alterations, structures, fixtures and improvements shall be and remain in the United States, except as hereinafter provided;
>
> "7. Prior to the termination of the lease, the Federal Public Housing Authority shall remove all buildings erected or constructed by it upon the demised premises; . . . "

Appendix 7

Defendants' Exhibit A-35 is the Judgment Fixing Just Compensation and Directing Payment of Rent for Term Beginning February 21, 1951, on Parcel #5 owned by petitioners. Judgment was entered July 23, 1951 and was based on a stipulation entered into between the government and predecessors in title and was dated Nov. 13, 1950. The stipulation is part of the same Exhibit A-35.

The stipulation provided:

> "NOW, THEREFORE, it is stipulated and agreed by and between the United States of America and the undersigned owner(s) of the above-mentioned parcel(s) that the just compensation and increased future payments payable annually by the United States of America for the use of said parcel(s) for the annual term beginning February 21, 1951 and for each and every extension or renewal thereof shall be in the following amounts:
>
> "Parcel No. 5 $21.00
>
> together with an amount equal to general real estate taxes lawfully levied and assessed against the said parcel(s), without interest or penalties thereon, for the current and each subsequent year the said parcel(s) is (are) used by the United States of America, and
>
> "IT IS FURTHER STIPULATED AND AGREED that in the event the United States shall terminate its use of the said parcel(s) or any of them during any annual term by the filing in this proceeding of a notice of termination, payment of the above-mentioned amount(s), including the amount(s) equal to general real estate taxes, shall be prorated for such proportion-

ate part(s) of the final annual term and the tax year as the United States shall use the said parcel(s)."

Excerpts from the judgment are as follows:

" . . . and it further appearing to the Court that the owners of said property have stipulated with petitioner, United States of America, that the sum of Twenty-one Dollars ($21.00), together with an amount equal to general real estate taxes lawfully levied and assessed against said parcel without interest or penalties thereon, for the current and each subsequent year of the Government's occupancy, is the just compensation for the year beginning February 21, 1951 and subsequent years of the Government occupancy, and it further appearing to the Court that the sum of Twenty-one Dollars ($21.00) is on deposit on account of the annual rent for Parcel 5 for the year beginning February 21, 1951, and the Court being fully advised in the premises,

"NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the just compensation to be paid for the estate condemned in Parcel 5 for the year beginning February 21, 1951, and all subsequent years of the Government's occupancy is the sum of Twenty-one Dollars ($21.00), plus an amount equal to annual general real estate taxes as provided in said stipulation on file herein, and

"IT IS FURTHER ORDERED that the respondents, Rose S. Larson, a widow, and Charles W. Endres are entitled to award of just compensation for the year beginning February 21, 1951, and the Clerk of this Court is hereby directed to pay to Rose S. Larson and Charles W. Endres the sum of Twenty-one Dollars ($21.00) in full satisfaction of the annual rent for the year beginning February 21, 1951, and

"IT IS FURTHER ORDERED that said judgment entered September 28, 1945, is in full force and effect as to all other provisions, except the amount of annual rent as herein provided."